1950

Horace F. Taylor dba Taylor Motor Service v. Kenneth R. Murray v. Charles P. Stuart : Brief of Respondents

Utah Supreme Court

Geo. D. Preston; Attorney for Respondents;

7570

In the Supreme Court
of the State of Utah

HORACE F. TAYLOR, doing business as TAYLOR MOTOR SERVICE
Plaintiff and Respondent,

vs.

KENNETH B. MURRAY,
Defendant and Appellant.

vs.

CHARLES P. STUART,
Third-Party Defendant and Respondent.

CIVIL CASE NO. 7570

Respondents' Brief

Appeal from the District Court of the First Judicial District of the State of Utah, in and for the County of Cache.

Hon. Lewis Jones, Judge.

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RESPONDENTS' BRIEF

The respondents do not agree with appellant's brief, and desire to controvert the same and state wherein said brief is inconsistent with the facts.

1. There was never a completed contract between Stuart and Murray; nor was there ever a meeting of the minds thereon.
2. Murray never took the Stuart certificate of title to the Hudson for Stuart to complete prior to November 9th, nor while in the employ of Taylor. Nor did he ever take the certificate to Stuart for the purpose of completing the same for his own behalf. On the contrary he obtained Stuart's

signature thereon as an agent of Taylor, at Taylor's request and for the purpose of returning the same to Taylor.

4. Taylor did not interfere with dealings between Murray and Stuart; nor did he cause a breach of contract between them; and in fact there never was such a contract. Any default by Murray to Lockhart Finance Co. was caused by Murray's own misconduct and failure.

5. Murray knew of the demands of the Finance Company, and voluntarily placed the Packard in storage, and failed and refused and neglected to bring the delinquencies up to date. Taylor did not retain the proceeds of re-sale, but applied them on the amount he had repaid to the Finance Company upon Murray's default.

6. Neither Taylor or Stuart admit by pleadings or otherwise that there was ever a contract between Murray and Stuart.

7. There is no stipulation between counsel that the only question was fraud, nor that the verdict of the jury would control the liability of the parties. Nor did the Court disregard the verdict of the jury.

8. Conclusions to be drawn from appellant's statement of facts lead to error, and the statement when considered as a whole is inconsistent with the facts.

STATEMENT OF FACTS

(For convenience, the parties are referred to by their surnames.) When Murray went to the beet field to make a deal with Stuart, he had previously been trying to sell

a new Packard, '50 model to Stuart (Tr. 57). As a matter of fact Muray said to Stuart: "I said to Mr. Stuart that this car was a 1950 Packard," and he further told Stuart that although it was registered with the State of Utah as a 1949, that the same could be changed to a 1950, through a "little red tape." (Tr. 85.) No such change of registration could have been made once it was registered. (Tr. 152-3-4). There is good reason why stuart wanted a '50 model, for it is common knowledge that there is a vast difference in trade value, and in fact original value of cars of different year models; in this case there was about $400.00 difference in '49 and '50 Packards and on the witness stand Murray was handed the National Automobile Dealers Association (N. A. D. A.) book and refused to read to the jury the values placed therein. Tr. 101-2) And when asked to give the jury the values as shown by the book, he said: "I won't." (Tr. 102).

Murray himself did not believe that he had concluded a contract because the title to the 1941 Hudson was turned in to Taylor and not Murray (Tr. 51) and on November 11th Murray was sent by Taylor over to Stuart's to get Stuart to sign the certificate of title on the Hudson. This, Murray did even after being discharged (Tr. 68). Murray never offered or tendered to Stuart the '49 Packard (Tr. 123 – 170), and did not, himself want to go through with the Stuart deal until he was settled with the Finance Company, even though he had taken the Hudson to

Taylor's. (Tr. 123). He treated the car as his at all times and in fact he obtained another buyer for it and asked permission of Taylor's auditor to keep it a few more days (Tr. 177). And this was between the 11th of November and 1st of December. He then did not claim he had made any binding deal with Stuart.

Murray had informed Stuart that the '49 Packard had been driven only 1600 miles and when Stuart examined it at Taylors on the 9th of November, the reading was found to be 2600 miles (Tr. 157).

Murray did not accomplish a completed transaction. The Hudson was not transferred by Stuart (Tr. 131), nor was the Packard ever tendered, or in condition to be tendered to Stuart because Murray turned it over to the Finance Company voluntarily (Tr. 123). Even though the Packard was placed, after re-possession, in Taylor's place it was tendered back to Murray by Taylor for exactly the same sum as Taylor was required to pay the Finance Company, namely $2100.00. This tender Murray refused or failed to accept (Tr. 186).

The cause of the loss of Murray's Packard to the Finance Company was not through any fault of Taylor's or of Stuart's. He abused the employees of Taylor's (Tr. 179) and came to the place of business in an intoxicated condition (Tr. 191), and in addition to this he received sufficient money in salary and commission to have redeemed the delinquent payment. He owned only an $80.00 or

$90.00 installment (Tr. 124), and when he was fired or quit he was paid $122.85 by Taylor (Tr. 175) which was only for one-third of the month of November.

Murray was paid and accepted the regular commission on the '50 Packard which was sold on the show-room floor, and this was after his services were terminated, thus indicating that he had not sold his own car, and felt that he was entitled to the commission on the new car (Tr. 106-7, 174-5-6 & 187).

Taylor did not impose himself on either Murray or Stuart and told both of them to settle their differences (Tr. 62, 66 and 188), and in pursuance to such instruction Murray took the title to the Hudson to Stuart, so Taylor could close the deal on the '50 Hudson, and brought the Hudson title back to Taylor (Tr. 110-1).

After Murray had received the commission on the '50 Packard from Taylor and after he had defaulted on the contract with the Finance Company and turned in the '49 Packard to them, and after Taylor had paid the Finance Company $2100.00, and after he had turned over the Hudson to Taylor, and after Stuart had taken out the new '50 Packard, Murray then changed his mind and finding the Hudson standing in front of Taylor's with the keys in it, he took possession of the Hudson, and drove it over to his home in Wellsville without the knowledge or permission of Taylor. (Tr. 54 & 92).

After Murray had driven his car about 2600 miles and had owned it about two months, he he charged Murray for his second hand, 1949 Packard, within about $40.00 of the price which Stuart could have bought the same type of 1950 Packard, brand new (Tr. 117-8).

Taylor and Stuart by their pleadings deny that any contract was entered into between Stuart and Murray (Tr. 17).

ARGUMENT

Point A

There was no such stipulation as set forth in appellant's brief, page 7 and 8, for there the Court said: "So we know where we're going, the Court understood it is to make findings on all issues not submitted to the jury, provided there's evidence to justify such findings" (Tr. 200).

The question of delivery of title to the Hudson, of the completed contract, and of general damages, and as to many other matters were never submitted to the jury. (See the Court's remarks Tr. 207-8).

Counsel for appellant insists in his brief (p. 8) that Stuart was doing business with Murray. This has conclusively been determined against appellant by the jury (Tr. 31) and the Court in finding No. 7, (Tr. 37) and amply supported by the evidence.

Without arguing appellant's brief page by page, suffice it to say that the only manner in which a comprehensive picture of the case can be had is to analyze the testimony as it reflects on the actions and conduct of Murray in the Courtroom, and by the evidence. We have here an over-reaching and over-zealous salesman who misrepresented to a lifelong friend that he was selling a '50 packard. (For a price that is within $40.00 of a new car of the same type). The actual difference in value if both '49 and '50 had been new is about $400.00. Murray justifies this practice by stating that he felt he was paying too much for the Hudson (Tr. 128) where he said that he gave about $150.00 more than the Hudson was worth.

It is interesting to follow the testimony of Murray on cross examination where an attempt was made over many pages of testimony in an effort to get him to tell the jury what the "blue book" (NADA) difference in value is between a '49 and '50 Packard.

"Q. Tell the jury the difference in value in a '49 and 1950 car.

A. That's a matter of who is selling it.

Q. You refuse to tell them that as quoted by the books, do you?

A. You tell them.

Q. Do you refuse?

A. You tell them . . . . . .

Q. You don't want to tell the jury?

A. No, I don't" (Tr. 115)
(And again at Tr. 101)

"Q. "I want you to tell the jury the difference in value to an automobile dealer of a turned-in '50 car on a repurchase, and you've got it (the NADA) right in your hand, and you can give it to the jury as easily as not. Will you do it or won't you?

A. I won't."

He claimed that he had not gained a penny on the whole deal, notwithstanding the fact that all of the transactions were handled through Taylor, and he was drawing a flat salary of $200 per month, plus three per cent commission on sales (Tr. 105). He would not admit that Taylor had paid him a commission on the 1950 Packard even when he had been shown the check which he had indorsed and on which was a computation showing three percent of the wholesale price of the Packard, less freight and taxes (Tr. 106-7).

Murray alleges in his pleadings and in his brief that he was damaged by reason of the misconduct of Taylor and Stuart, notwithstanding the fact that the cause of his discharge was that he abused the auditor by calling him a liar and otherwise causing a commotion in Taylor's place of business and entering the place in a drunken condition Tr. 179 – 191). Not only that, but when he first came back from Stuart's, he left the papers in the seat of an old

Studebaker, and did not show up for work again for two or three days (Tr. 65). And in addition to this, all the while he having drawn $200 per month plus commissions, he defaulted on his contract with the Finance Company, and this he also blames to Taylor and Stuart. It was for this sort of conduct that the Court made it finding No. 9 as follows:

> . . . "while all of the allegations of the answer and counter-claim and third party complaint, were and are untrue and incorrect. In this connection, this court further finds that neither Charles P. Stuart nor the plaintiff ever breached any contract with the defendant Ken Murray, and that said Ken Murray has not been damaged in any respect by the acts of any of the other parties to this action, but that said damages and injuries, if any, sustained by said Ken Murray, were brought about solely by his own mistakes and inability to meet his obligations."

The question of general damages was left strictly to the Court and this has been settled by conclusion No. 2, "That the defendant is not entitled to judgment against either the plaintiff or the third party defendant" (Tr. 38).

Also, finding 8 is amply supported from the evidence hereinbefore quoted:

> "the court further finds that said Ken Murray never did leave the title papers for his own Packard car with anyone at the plaintiff's garage for delivery to Stuart, nor did he ever offer personally to deliver to said Stuart the title papers to his own Packard; the

> most that said Murray ever did in this respect was to make it possible for Mr. Stuart to obtain the possesion of said Packard only, and that said Stuart, believing that he was dealing with the plaintiff, and never having been tendered the title to Murray's Packard, was at liberty to change his mind in his dealings with the plaintiff, the said Stuart believing all along that he was dealing with the plaintiff through Ken Murray as plaintiff's agent, and to select another Packard automobile on the floor of the plaintiff's showroom, which he did do."

No part of the above finding had anything to do with the question of fraud determined by the jury, and in fact the jury made the same finding in answer to interrogatory No. 3 (Tr. 31). This, then concludes the entire case in favor of plaintiff and Stuart.

Counsel complains (on page 15 of his brief) of my objection. I ask the Court to consider that my reference to the 1949 Packard is either a mistake of the reporter or an inadvertance on my part. On page 67, I refer to the same matter, and mention the 1950 Packard. All through the pleadings and evidence we have claimed that Murray represented his car as a '50 Packard. As an example of this refer to the question the Court asked Murray: (Tr. 85)

> "Mr. Murray, I'll ask you the nature of the conversation that you had with Mr. Stuart at the time you made this trade in the field that you have just testified to. Or sale of the Packard car, as to a '49 or '50 model Packard. A. I said to Mr. Stuart that this car was a 1950 Packard."

There was then some question which arose as to changing the designation after registration with the State, and both Taylor and the State Tax Commission representative said that this cannot be done, and of course, such is the case.

The general argument here disposes of each point catagorically argued by appellant, but it is important to meet the challenge of counsel at the bottom of page 18. This is not a matter of failure of consideration. Murray claims he had the title to the Hudson, but there is not a word in evidence to the effect that he could ever have performed had there been a contract with Stuart. In fact he voluntarily turned his Packard in as above stated, and then said that he did not want to go through with the Stuart deal until he had straightened out his affairs with the Finance Company (Tr. 123 & 170). As further evidence of this I point to the fact that Murray asked Taylor if he could keep the car for a few more days, because he had a sale for it (Tr. 177-8) to another party.

The contention of counsel that certain findings of the Court are not within any issue joined, and the contention that the verdict of the jury is binding are without merit. Appellant pleads that he is the owner of the Hudson. The Respondents both generally deny this allegation (Tr. 3, 4, 6 & 8, 17 & 18). Furthermore, Respondents pleaded as follows: (Tr. 7 & 8)

> "That at the time the defendant was still employed with the plaintiff and thereupon, as an agent of the

plaintiff and in order to deliver the possession of said automobile (Hudson) and the certificate of title thereto from the said Charles Stewart to this plaintiff, but after he had terminated his employment with the plaintiff, secured from the said Charles Stewart the possession of said Hudson automobile and the certificate of title thereto upon the representation to the said Charles Stewart that he, the said defendant, would deliver the possession of the said automobile and certificate of title thereto to this plaintiff, and that the said defendant did, as a fact, deliver the possession thereof to the plaintiff at his place of business in Logan, Utah, and deposited the unsigned certificate of title with the plaintiff; that shortly after such delivery the defendant secured from this plaintiff said certificate of title upon the representation to this plaintiff that he would secure the signature thereon of the said Charles Stewart and deliver the same back to this plaintiff, all of which representations the defendant did not intend to fulfill and, as a matter of fact, has never delivered the possession of such certificate to this plaintiff and still keeps and holds the same against the will and consent of this plaintiff. Further answering said paragraph, plaintiff alleges that defendant surreptitiously and secretly and without the consent of this plaintiff took the possession of the said Hudson automobile out of the possession of this plaintiff wrongfully, illegally, and without any right, title or ownership therein."

I do not claim to be a master of pleading, but I feel certtain that the general denial of ownership of the Hudson in defendant, and the above copied matter from the pleadings plainly puts in issue every finding of the Court. And under Rule 49 of Utah Rules of Civil Procedure, this

issue not having been demanded by Counsel to be determined by the jury was properly before the Court.

Points B. C. and D.

All these points are related to the arguments under A above, and while here controvertted, it is felt that it would take useless time and space to repeat.

CONCLUSION

The Findings, Conclusions and Judgment should be affirmed.

Respectfully submitted

GEO. D. PRESTON
Attorney for Respondents.